

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No. 4:93CR14WS
PAUL B. CLARK,	)	
	)	Violation:
Defendant.	)	15 U.S.C. § 1

REQUEST BY UNITED STATES FOR  
PRELIMINARY INSTRUCTION

The United States requests the Court to give the jury in this case a brief, preliminary instruction on the substantive law of the Sherman Act offense charged. (See attached "Requested Preliminary Instruction".)

Although most businesspersons are aware or should be aware of the meaning and illegal nature of per se violations of the Act, many other laypersons, and potential jurors, do not have a working familiarity with the term "bid rigging." Without a basic understanding of this term at the beginning of the trial, they will not be able to appreciate the significance of much of the evidence both the United States and the defense will introduce. They will not be able to evaluate, as the trial progresses, whether each piece of evidence tends to prove or disprove the violation charged. Unlike many federal criminal statutes, Section One of the Sherman Act contains only general language and

is broad in scope. It is only through years of judicial interpretation that certain per se offenses have been clearly defined. All of the jurors cannot be expected to be familiar with these interpretations. Clearly, a mere reading of the statute is not sufficient to define the per se violation alleged here.

The use of preliminary substantive instructions has not only been allowed, it has been recommended as the better practice. United States v. Bynum, 566 F.2d 914 (5th Cir.), cert. denied, 439 U.S. 840 (1978). Bynum involved a conspiracy trial in which the trial judge, over defense objections, gave a number of substantive preliminary instructions, including the elements of the offense charged, at the beginning of the trial. The former Fifth Circuit rejected the defendant's claim of error:

Although it is difficult for the courts to give preliminary jury instructions in all cases, it is not only not error to do so, it is a well-reasoned modern trend to give instructions outlining the issues and the law involved prior to the taking of testimony. We, therefore, find no merit in defendant's argument.

Id. at 924. The court also noted that preliminary instructions are "very appropriate" in a conspiracy case such as Bynum to assist the jury in understanding the issues involved and the application of the law. Id. at 924 n.7. See also United States v. Meester, 762 F.2d 867 (11th Cir. 1985).

In another case decided by the former Fifth Circuit, United States v. Ruppel, 666 F.2d 261 (5th Cir. Unit A), cert. denied, 458 U.S. 1107 (1982), the court reiterated the importance of preliminary instructions. While

emphasizing that a trial judge must give full instructions at the end of the trial, the court said that ideally the judge should also give instructions to the jury at the beginning of trial on "preliminary matters that are necessary to guide them through the trial." 666 F.2d at 274.

Defense counsel may oppose the giving of any substantive preliminary instructions. This is perhaps understandable from the defense point of view. The prosecution has the burden of proving the charge in the indictment beyond a reasonable doubt, a heavy burden, and it may be in the defendant's interest for the jury to be confused throughout the trial as to what the prosecution is trying to prove. Such confusion, however, is not in the interest of justice. It is important that the jury understand both the prosecution case and the defense case so that their verdict will be informed.

We strongly urge the Court to give the preliminary instruction as requested or with any modifications or additions the Court deems appropriate.

Respectfully submitted,

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REQUESTED PRELIMINARY INSTRUCTION

It is requested that the Court give the following instruction to the jury at the beginning for the trial, immediately after the indictment has been read or summarized:

The basic charge in the indictment is an agreement or understanding among competitors to agree upon or rig bids

submitted to certain school boards in Mississippi for contracts to supply dairy products to public schools. Now, I will instruct you in detail on the applicable legal principles at the end of the trial, but let me say for now that bid rigging, which is the essence of the charge in the indictment, means any agreement, arrangement or understanding among competitors which tampers with the normal competitive process which determines their prices. Bid rigging includes any agreement which affects prices, such as, for example, an agreement among bidders that one of them will be the designated winner, or an agreement to bid higher or lower than the other, or an agreement whereby an individual or company agrees to not bid at all.

In the normal competitive system of free enterprise, competitors reach their decisions concerning prices separately and independently. If a company reaches an independent decision to bid a certain price and a competitor, by coincidence or the forces of competition, independently reaches the same decision, there is no violation. However, if competitors set their bid prices in cooperation with each other, by agreement or understanding, then there is a violation, assuming interstate commerce has been restrained. I will explain to you what I mean by interstate commerce at the end of the trial.

